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No. 02-996

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IN THE

Supreme Court of the United States

OVERNITE TRANSPORTATION COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE,* AND BRIEF *AMICUS CURIAE*, OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONERS

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23 pp

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The National Right to Work Legal Defense Foundation, Inc. ("Foundation"), respectfully moves for leave to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari in this case. Consent of Petitioner's attorney was obtained. Consent of attorneys representing the various Respondents was not obtained, as they either refused consent or did not respond to telephone calls seeking consent.

The Foundation is a charitable, legal aid organization formed to provide legal assistance to individual employees who have been denied, or coerced in the exercise of, their right to refrain from the collective activity foisted upon them by forced association. Foundation attorneys have represented the interests of individual employees in major Supreme Court cases involving employees' rights to refrain from joining or supporting labor organizations as a condition of employment.

The Foundation is concerned that the state policy under review will expose individual employees, for whom the Foundation exists to provide legal aid, to union campaigns of violence and intimidation. The Illinois judiciary's policy of predicating access to state law causes of action on the surrender of federal labor rights directly impedes the primary purpose of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, ("NLRA" or "Act"): protecting employee rights. In particular, Illinois employers and employees will have a strong disincentive to filing unfair labor practice charges regarding union conduct which also causes tortious damages. This threatens to emasculate enforcement of employees' federal labor rights, leaving workers at the mercy of coercive union tactics.

While the Petitioner has aptly briefed the judicial conflict presented by this case, the Foundation's brief delineates the importance of the issue presented to employee rights and physical safety. For this reason, it is respectfully requested that the Foundation's motion for leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as

[1] Pursuant to Supreme Court Rule 37.6, the Foundation states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Foundation, its members or counsel, made a monetary contribution to the preparation or submission of this brief.

a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states.

The Foundation provides legal aid to employees who have been injured by union violence as a result of the exercise of their legal rights. *See, e.g., Crawford v. United Steelworkers of America*, 335 S.E.2d 828 (Va. 1985); *Allen v. IAM Local 1297*, 120 L.R.R.M. (BNA) 2501 (Ohio. App. 1984), *rev'd in part*, 490 N.E.2d 865 (Ohio 1986); *Hinote v. Local 4-23, Oil, Chemical & Atomic Workers Union*, 777 S.W.2d 134 (Tex. App.), *error denied* (Tex. 1989). Moreover, the Foundation has provided counsel in most of the major United States Supreme Court cases involving the right to refrain from joining or supporting a labor organization as a condition of employment. *ALPA v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

The Foundation supports this petition for a writ of certiorari because the legal issue under review directly affects workers for whom the Foundation exists to provide legal aid. The Illinois judiciary's policy of predicating access to state law causes of action on the surrender of federal labor rights directly impedes the primary purpose of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA" or "Act"): protecting employee rights. In particular, Illinois employees subjected to union campaigns of violence and intimidation are effectively deprived of the Act's protection under the decision at bar.

QUESTION PRESENTED

The Foundation hereby adopts and incorporates by reference the Petitioner's Question Presented.

STATEMENT OF THE CASE

The Foundation hereby adopts and incorporates by reference the Petitioner's Statement of the Case. The Foundation emphasizes that the charges filed by Overnite Transportation Co. ("Overnite") with the National Labor Relations Board ("NLRB") were to vindicate *employees'* rights that were allegedly violated by the Teamsters. Pet. App. at 38 (Overnite alleges that the conduct of the Teamsters "has been restraining and coercing *employees* in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A)") (emphasis added).

SUMMARY OF THE ARGUMENT

The Petition should be granted because the Illinois Appellate Court's construction of the Supremacy Clause of the United States Constitution is in direct conflict with *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), and *Livadas v. Bradshaw*, 512 U.S. 107 (1994). The state court applied Section 2-619(a)(3) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(3), to bar Overnite's state law tort actions solely because Overnite also sought enforcement of its employees' rights under the NLRA. Pet. App. 13-14. Predicating benefits of state law on abstention from exercising federal labor rights is in direct violation of the Supremacy Clause, as construed in *Nash* and *Livadas*.

The issue this case presents is important, as it affects the enforcement of the federal labor rights of thousands of Illinois citizens protected by the NLRA. Illinois' policy forces employers such as Overnite, when confronted with a concerted campaign of violence and intimidation by a labor union, to choose between seeking monetary compensation in state court for itself, or standing up for its employees' rights under the NLRA. Likewise, employees who have been harmed must choose between seeking either damages or redress of their federal labor rights. Illinois' imposition of this Hobson's choice inherently deters enforcement of the Act, thereby emasculating employee rights and leaving workers at the mercy of coercive union tactics.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review to Resolve the Direct Conflict Between This Court's Decisions and the Illinois Appellate Court's Construction of the Supremacy Clause of the United States Constitution.

The Illinois Appellate Court's construction of the Supremacy Clause of the United States Constitution is directly contrary to this Court's holdings in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), and *Livadas v. Bradshaw*, 512 U.S. 107 (1994). Accordingly, a grant of certiorari is appropriate. *See William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 14 (1974) (certiorari granted to determine whether Florida Supreme Court's holding that state law claims were preempted by federal labor law "was consistent with the decisions of this Court"); *Limbach v. Hooven & Allision Co.*, 466 U.S. 353, 362 (1984) (certiorari granted because of concern that "a state court disregarded a federal constitutional ruling of this Court").

Nash involved a ruling by the Florida Industrial Commission that employees who file unfair labor practice charges with the NLRB surrender their right to state unemployment benefits. This Court found it "obvious . . . that this financial burden which Florida imposes will impede resort to the Act." 389 U.S. at 239. Thus, the Commission's ruling violated the Supremacy Clause, for a state "should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Id.*

Similarly, in *Livadas*, a California court refused to enforce an employee's state right to back pay, because she was covered by a collective bargaining agreement subject to federal labor law. This Court found the policy violative of the Supremacy Clause, as it forced individuals who exercised their rights under the NLRA to surrender benefits of state law. 512 U.S. at 116 ("A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose.").

The Illinois Appellate Court's application of Section 2-619(a)(3) imposes the same impediment to the exercise of rights guaranteed by the NLRA as that found unconstitutional in *Nash* and *Livadas*. Overnite's state law claims for monetary damages were dismissed solely because Overnite filed unfair labor practice charges under the NLRA. Pet. App. at 13 ("While Overnite was not restricted in its choice of forum, once it chose to pursue the NLRB proceedings first, it was bound by the relief offered in that forum."). Accordingly, the Illinois judiciary's decision to condition access to its courts on refraining from the exercise of federal statutory rights is in direct conflict with prior decisions of this Court.

II. Whether a State May Preclude Those Who File Unfair Labor Practice Charges with the NLRB from Maintaining Lawsuits in State Court Is an Issue of Great Public Importance.

A legal right is valuable only to the extent that it is enforced. The federal rights guaranteed by the NLRA can only be enforced by the NLRB upon the filing of an unfair labor practice charge. *See* 29 U.S.C. § 160(a). The Illinois Appellate Court's application of Section 2-619(a)(3) strongly deters employees and employers from filing valid unfair labor practice charges, particularly in situations involving violence and intimidation by labor unions. This emasculates the rights the NLRA guarantees employees, and leaves workers exposed to coercive union tactics.

The NLRA grants employees a variety of federal rights. *See* 29 U.S.C. § 157. Congress established procedures and an agency–the NLRB– to protect those rights against infringement. *See* 29 U.S.C. §§ 153, 160-62. However, a prerequisite to triggering enforcement of the Act is the filing of an unfair labor practice charge. *See* 29 U.S.C. § 160(a); *Nash*, 389 U.S. at 239 ("Implementation of the Act is dependent upon the initiative of individual persons"); *Operating Engineers Local 138 (Charles S. Skura)*, 148 N.L.R.B. 679, 681 (1964) ("The right to file charges is indispensable to the administration of the Act since the Board cannot initiate its own processes and no unfair labor practice complaint can issue in the absence of a valid charge."). To ensure robust enforcement, "any person" is permitted to file an unfair labor practice charge alleging an infringement of employee rights. NLRB Rules & Regulations § 102.9.

The Illinois Appellate Court's construction of Section 2-619(a)(3) discourages the filing of valid unfair labor practice charges. If conduct potentially violates both the NLRA and Illinois law, a party–whether an employee or employer–must

choose between enforcement of federal rights guaranteed by the NLRA or pursuit of civil remedies provided under state law. Illinois' imposition of this Hobson's choice naturally impedes resort to the NLRB. *See Nash*, 389 U.S. at 239.

In situations involving property damage and physical injury caused by labor unions, the price of seeking enforcement of an employee's federal labor rights is particularly steep: complete waiver of any monetary relief for the damages incurred. The NLRB's statutory authority to provide monetary remedies is sharply limited by 29 U.S.C. § 160(c) to "affirmative action including reinstatement of employees with or without back pay." This Court has found that this remedial power is not a "substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." *Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954). Thus, reimbursement for property damage resulting from union unfair labor practices is not awarded by the Board because "[t]he assessment of such damages to automobiles and other property is a matter which can be handled more efficiently and effectively by State courts." *Service Employees Dist. 1199 (J.J. Jordan Geriatric)*, 312 N.L.R.B. 90, 102 (1993), *citing Roofers Local 30 (Associated Builders)*, 227 N.L.R.B. 1444 (1977).

Monetary relief available to employees under the Act, 29 U.S.C. § 160(c), is further limited by the Board's refusal to provide back pay to those who lose work due to physical injury resulting from even breathtakingly violent union actions. *See Iron Workers Local 783 (BE&K Constr.)*, 316 N.L.R.B. 1306,

1308-10 (1995),[2] and *Operating Engineers Local 513 (Long Constr.)*, 145 N.L.R.B. 554, 555-56 (1963).[3]

The Board has explicitly cited the availability of state damages as a reason for denying employees back pay for time lost due to union violence:

> We are dealing here with conduct which, though violative of the Act, is not beyond the reach of State power. The Act generally preempts State authority with respect to conduct within [the Act's] purview.

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[2] In *BE&K Construction Co.,* the union was responsible for a riot that burned down the employer's construction camp, causing over $2 million in property damage and seriously injuring numerous people. *BE&K Constr. Co. v. NLRB*, 23 F.3d 1459, 1460 (8th Cir. 1994), *on remand,* 316 N.L.R.B. 1306 (1995).

[3] According to the Board:

> In *Long Construction*, the union violated Section 8(b)(1)(A) when its business representative led a group of about 75 to 100 men to the employer's construction site, where members of a 40- to 50-man subgroup led by the union business representative assaulted nonunionized employees of the employer by (1) breaking one's jaw, knocking out his teeth, knocking him unconscious, and rendering him unable to work for 2 months; (2) knocking another unconscious; (3) striking a foreman (who had come to the aid of an attacked employee) with brass knuckles; (4) shooting (with pistols) at another employee; (5) beating up another employee as he was trying to escape from the group; and (6) striking and knocking out another employee as he attempted to rescue his son from being attacked by the group, rendering the father unable to work for a month.

BE&K Constr., 316 N.L.R.B. at 1308, *citing Long Constr.*, 145 N.L.R.B. at 559 n.11.

> However, it does not preempt State authority to deal with breaches of the peace stemming from the use of force and violence in labor disputes. The States can act to enjoin such conduct, and they can remedy the consequences of such conduct. It is thus apparent that the lack of a Board order, awarding backpay to employees unable to work because of injuries resulting from this unlawful conduct, will not leave such employees without redress against those responsible for their injuries.

BE&K Constr., 316 N.L.R.B. at 1308-09, *quoting Long Constr.*, 145 N.L.R.B. at 555-56.

Moreover, employers are not entitled to monetary relief under the NLRA in union violence cases in any event, as their rights are not at issue. Union campaigns to intimidate workers and employers only infringe on the § 7 rights of *employees* in violation of § 8(b)(1)(A) of the Act, as Overnite's unfair labor charge alleges. *See* App. Pet. at 38; *see also J.J. Jordan Geriatric*, 312 N.L.R.B. at 98 ("long settled law" that violent acts committed by unions on picket lines violate § 8(b)(1)(A)).

Thus, the Illinois judiciary has effectively imposed a harsh monetary penalty on anyone who alerts the NLRB to violations of employee rights stemming from union violence and intimidation. A charging party in Illinois is forced to forbear monetary relief for damages incurred that are available only under state law. Perversely, the amount of the penalty increases with the extent of the harm and property damage caused by the union.[4]

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[4] Overnite's complaint does not indicate the amount of its damages. However, property damages caused by union campaigns can be excessive. For example, property damage incurred by the employer in

(continued...)

This will discourage both employees and employers from filing unfair labor charges, as many place their own financial interests ahead of the labor rights of employees.

By deterring the filing of unfair labor charges, the Illinois Appellate Court's construction of Section 2-619(a)(3) will drastically decrease the NLRB's enforcement of employees' § 7 rights when those rights are infringed upon by violent and threatening union practices. This emasculates the § 7 rights themselves, as rights that are not enforced are little better than no rights at all. Moreover, it undermines the primary legislative purpose behind § 8(b)(1)(A), which is to "protect[ ] individual workers from union organizational tactics tinged with violence, duress or reprisal." *NLRB v. Local 639, Int'l Bhd. of Teamsters*, 362 U.S. 274, 286 (1960).

Moreover, by deterring employers from filing unfair labor practice charges with the NLRB in situations involving orchestrated union violence and intimidation, Illinois leaves employees at the mercy of those coercive campaigns. Generally, only employers are in a position to successfully bring unfair labor practice charges against the concerted use of threats and physical force by a labor organization.

First, usually only an employer has information regarding the entirety of the union campaign. An individual employee is likely to witness only isolated acts. An employer, through its various agents and other means, has a more complete picture of events.

Second, employers have the financial and legal resources necessary to see that an unfair labor practice charge is properly

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[4](...continued)
BE&K Construction Co. was estimated at over $2 million. 23 F.3d at 1460.

processed by the NLRB. While the NLRB General Counsel's office is responsible for investigating and prosecuting a charge, 29 U.S.C. § 153(d), a charging party actively assists in these efforts. NLRB Casehandling Manual §§ 10040.4, 10054.1, 10054.5. Moreover, a charging party is responsible for appealing adverse determinations by the General Counsel's office itself. NLRB Rules & Regulations § 102.19.

Third, an employer is less likely to be intimidated by a labor organization prone to violence than are individual employees. Employees may fear reprisals from union militants, both at work and at home, if they file an unfair labor practice-charge. A corporate entity is unlikely to be similarly frightened.

Juridical history bears this out. A survey of the applicable jurisprudence indicates that employers have filed large numbers of unfair labor charges in which union violence and/or threats were found to violate § 8(b)(1)(A). *See BE&K Constr.; see also J.J. Jordan Geriatrics; Carpenters Philadelphia Dist. Council (Deltran Builders)*, 307 N.L.R.B. 172 (1992); *Carpenters (Reeves, Inc.)*, 281 N.L.R.B. 493 (1986); *Auto Workers Local 695 (T.B. Wood's)*, 311 N.L.R.B. 1328, 1336 (1993); *Tri-State Building & Trades Council (Structures, Inc.)*, 257 N.L.R.B. 295 (1981); *Broadway Hospital, Inc.*, 244 N.L.R.B. 341 (1979); *Roofers Local 30 (Associated Builders)*, 227 N.L.R.B. 1444 (1977); *Union de Tronquistas, Local 901 (Lock Joint Pipe)*, 202 N.L.R.B. 399 (1973); *Laborers Local 383 (Carter-Glogan Labs)*, 260 N.L.R.B. 1340 (1942).

As imposed by the Illinois Appellate Court, the disincentive to employers filing unfair labor practice charges exposes workers in Illinois to orchestrated campaigns of union violence and intimidation. This threat is grave, as an exhaustive analysis of the subject has shown that union violence is common. *See* Armand J. Thiebolt, Thomas R. Haggard, and Herbert R. Northrup, *Union Violence: The Record and the Response by*

Courts, Legislatures, and the NLRB, Labor Relations & Public Policy Series No. 25 (1999). According to this scholarly analysis, there were 9,785 reported incidents of union violence between 1975 and 1996. *Id.* at 19, *citing* "Violence Events Data File" maintained by the National Institute for Labor Relations Research. Approximately 350 such incidents occurred in Illinois. *Id.* at 20. The extensive scope and savagery of many of the union campaigns is documented throughout the monograph.[5]

The facts of the case at bar are illustrative. The allegations in Overnite's complaint, if true, demonstrate the highly organized use of unlawful and coercive conduct by the Teamsters Union. Pet. App. at 23-29. It would be exceedingly difficult for a single employee to attempt to stand up for his and his co-workers' federal labor rights against such concerted activity by the Teamsters. Only Overnite is in a strong position to see that its employees' § 7 rights are not trampled upon by the union's campaign. Yet, under the decision of the Illinois Appellate Court, Overnite and other employers now have a strong financial incentive to never file such unfair labor practice charges. As a consequence, employees and their federally guaranteed rights can only suffer.

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[5] The authors find that, between 1975 and 1996, reported acts of union violence included: 248 deaths, 1,021 incidents involving guns, 427 incidents involving explosives, and 379 acts involving "heinous activities." *Id.* at 464-65.

CONCLUSION

For the reasons set forth in the Petition and in the foregoing brief, the Foundation respectfully requests that the Petition be granted and the decision of the Illinois Appellate Court be reviewed and ultimately set aside.

Respectfully submitted,

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